(24)

SUPREME COURT OF THE UNITED

Office - Supreme Gaurt, U. 1

IFILE WIYO

APR 7 1943

STATES ELNORE CROPU

OCTOBER TERM. 1942

Nos. 893-894

GEORGE E. EDDY AND SAMUEL SILBIGER,

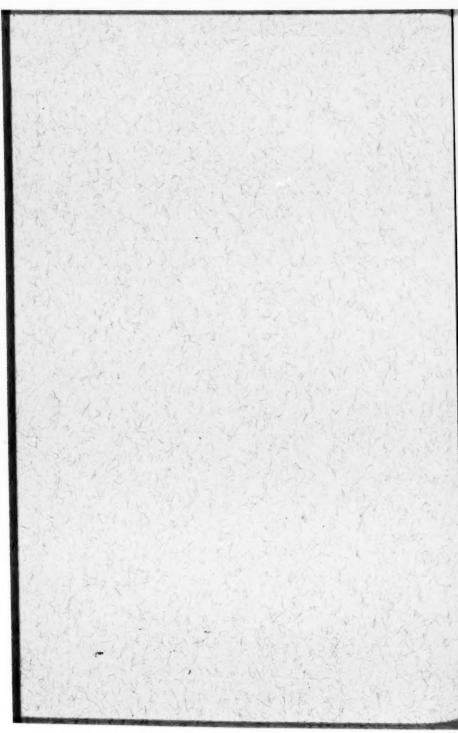
Petitioners,

US.

CHARLES H. KELBY AND CLIFFORD S. KELSEY, TRUSTEES OF THE DEBTOR, PRUDENCE BONDS CORPO-RATION (NEW CORPORATION), RECONSTRUCTION FINANCE CORPORATION, ET AL.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

SAMUEL SILBIGER, Counsel for Petitioners.



#### INDEX.

SUBJECT INDEX.

	Page
Petition for writs of certiorari	1
Opinions below	2
Jurisdiction	2
Questions presented	2
Statement	4
Specification of errors	9
Reasons for granting the writs	10
Brief in support of petition	12
Point I. The appeal to the Circuit Court was	
properly taken as of right	12
II. The reorganization trustees had no inter-	
est in the trust estates involved in the	
accountings; therefore, any award to	
them and their counsel, chargeable to	
the trust funds, is, as matter of law, be-	
yond the power and jurisdiction of the	
court and is indefensible	17
III. Assuming section 250 of the bankruptcy	
act is applicable in the case at bar, the	
Circuit Court abused its discretion in	
denying petitioners' application for an	
allowance of an appeal	19
Conclusion	20
Appendix	21
TP	
TABLE OF CASES CITED.	
Bell v. Roberts, 112 F. (2d) 585	13
Berl v. Crutcher, 60 F. (2d) 440	14
Camden Rail & Harbor Terminal Corp., 35 Fed. Supp.	14
862	13
Central Hanover Bank & Trust Co. v. Bank of Man-	19
hattan, 105 F. (2d) 130	5
Central R. R. Co. v. Pettus, 113 U. S. 116.	
Cumberland Glass Co. v. DeWitt, 237 U. S. 407	,
Cumbertana Gues Co. v. Den m, 201 C. S. 401	13

#### INDEX

1	Page
Dickinson v. Cowen, 309 U. S. 382	12, 17
Gillespie, In re, 190 Fed. 88	123 N. Y. S. 126 10, 26
Hart v. Goadoy, 138 App. Div. 100	16
Heinsheimer, In re, 214 N. Y. 361	Cupp 021 13
Mallow Hotel Corporation, 29 Fed.	105 F (0d) 650 8 15 18
a a de de la	[Zi] F. (Zu) 000
a. Hima & Refining Works	V. Brightwood Bronze
Foundry Co. 265 U. S. 209, 44 S	up. Ct. 500, 00 11. 24.
1010	
Smith v. First National Bank of A	lbany, 103 Misc. 274,
170 N. Y. S. 127	16
170 N. Y. S. 127	2 161 16
Sprague v. Ticonic Bank, 307 U.	10. 18. 19
Trustees v. Greenough, 105 U. S. 5	24
STATUTES	CITED.
Bankruptey Act, Section 25(a)	
n 1 ton Act Scotion (III)	
D Lamber Act Sec 77B (Art.	AIII, Chap. At or the
Chandler Act)	
1. 1: in Code Sec 240(8)	
Judicial Code, Sec. 250	4,15
Judicial Code, Sec. 200	

# SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1942

### Nos. 893-894

# IN THE MATTER OF PRUDENCE-BONDS CORPORATION,

Debtor,

IN THE MATTER OF

THE JUDICIAL SETTLEMENT OF THE ACCOUNTS OF PROCEEDINGS OF CITY BANK FARMERS TBUST COMPANY, ETC.

GEORGE E. EDDY AND SAMUEL SILBIGER,

Petitioners,

vs.

CHARLES H. KELBY AND CLIFFORD S. KELSEY,
TRUSTEES OF THE DEBTOR, PRUDENCE BONDS CORPORATION (NEW CORPOBATION), RECONSTRUCTION
FINANCE CORPORATION, JOSEPH NEMEROV,
GEORGE C. WILDERMUTH AND CHARLES H.
KELBY.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, The Supreme Court of the United States: George E. Eddy and Samuel Silbiger pray that writs of certiorari issue to review the two orders (R. 92, 118) of the United States Circuit Court of Appeals for the Second Circuit, made in the above-entitled matter, respectively, on January 7, 1943, and March 2, 1943, by the first of which orders their petition to said Court for the allowance of an appeal from an order (R. 104) of the District Court for the Eastern District of New York was denied; and by the second of which the appeal (R. 108) from said order of the District Court, taken by petitioners and others, as of right, was dismissed on motion (R. 118).

#### Opinions Below.

The Circuit Court of Appeals rendered no opinions on the motions for the allowance of the appeal or on the motions to dismiss the appeal taken as of right.

#### Jurisdiction.

The order denying leave to appeal was entered in the Circuit Court of Appeals on January 10, 1943; the order dismissing the appeal was entered March 2nd, 1943.

The jurisdiction of the Court to review the decisions of the Circuit Court of Appeals is invoked under Section 240(a) of the Judicial Code, as amended by Act of Congress of February 13, 1925 (U. S. Code, Title 28, Section 347).

#### Questions Presented.

1. Where, in a corporate reorganization proceeding under Sec. 77B of the Bankruptcy Act (Art. XIII, Chap. X of the Chandler Act), the bankruptcy res in the actual or constructive possession of the Bankruptcy Court, consisted of eighteen trust funds, each securing the debtor's bonds issued under eighteen separate substantially similar trust agreements with various corporate trustees, the eighteen separate plans of reorganization and the general plan of reorganization approved and confirmed by the Court (after the debtor had been adjudged insolvent and eliminated from any right or interest in such trust funds), provided

- (a) for the creation of a new corporation to succeed to the rights of the debtor, the bondholders receiving voting trust certificates representing the entire capital stock thereof; (b) the bonds be modified; (c) the various corporate trustees were removed from office and a substitute trustee appointed under modified trust agreements, and (d) the corporate trustees had transferred and delivered the respective trust funds to the substitute trustees; (e) the trustees of the debtor in reorganization had, pursuant to the orders of the Court, surrendered, transferred and assigned to the new corporation all their right, title and interest in the respective trust funds-and thereafter the respective removed corporate trustees filed in the District Court accounts of their proceedings under the respective original trust agreements and prayed for a judicial settlement thereof; are such accounting proceedings a part of the "reorganization proceedings" and the new corporation or the trustees of the debtor who have no beneficial interest in the respective trust funds necessary or proper parties, and have they any standing to appear and object to such trustees' accounts?
- 2. Are such accounting proceedings independent of and collateral to the bankruptcy reorganization proceeding?
- 3. Was the Federal Court required to and did it apply the New York State law governing the substantive rights of the bondholders and counsel representing the bondholders?
- 4. Has the District Court, on a summary application, the power to award compensation for services payable out of the fund, to volunteers who have no interest in and no right to a share in the fund realized from such litigation? or to the attorney for such volunteers?
- 5. Is the procedure on appeal from the awards of compensation for services rendered in the proceedings for the

judicial settlement of the accounts of the removed corporate trustees governed and regulated by Section 250 of the Bankruptcy Act, by Section 25(a) of the Bankruptcy Act, or by the Judicial Code and the Federal Rules of Civil Procedure?

#### Statement

The debtor filed its petition for reorganization under Section 77B of the Bankruptcy Act on June 29, 1934, and respondents Charles H. Kelby and Clifford S. Kelsey were appointed trustees and duly qualified and acted as such (R. 2). An order adjudging the debtor to be insolvent was entered April 27, 1937 (R. 2). The amended plans of reorganization of the eighteen corporate bond issues of the debtor and the amended general plan of reorganization were approved and confirmed on January 18, 1938 (R. 3).

The separate plans each provided for a modification of the bonds, the removal of the corporate trustee and the appointment of a substitute trustee under a modified trust agreement, and the general plan provided for the creation of a new corporation with the same name as debtor (hereinafter referred to as the New Corporation) to succeed to the rights of the debtor and perform the servicing of the collateral security underlying the eighteen series of bonds (R. 3).

By orders of April 27, 1938, and June 6, 1938, the form of supplemental trust agreements was approved and their execution authorized; the effective date of this plan was fixed as of March 1, 1938; the selection of the City Bank Farmers Trust Company as substituted trustee under the respective eighteen trust indentures was confirmed; the deposed corporate trustees were directed to and did transfer and convey the respective trust funds to the substituted trustee; and the debtor's trustees, respondents Charles H. Kelby and Clifford S. Kelsey were directed to and did trans-

fer and assign to the New Corporation all their right, title and interest in and to the underlying collateral securing the eighteen bond issues (R. 3-4).

By the orders confirming the separate plans and the general plan of reorganization and said orders of April 27, 1938, and June 6, 1938, the District Court reserved jurisdiction to carry out and consummate the plans (R. 2-3).

After the deposed trustees transferred the various trust funds to the substituted trustee pursuant to the plans and after the Bankruptcy Court surrendered whatever actual or constructive possession or control it had of the trust funds by the transfer of all the rights, title and interest of the debtor's trustees to the new corporation, accountings were filed by the deposed corporate trustees in August and September, 1938, of their acts and proceedings under the respective trust indentures, and they prayed that such accounts be judicially settled (R. 4).

The jurisdiction of the District Court to judicially settle said accounts was challenged and the District Court held it was without jurisdiction over the acts and proceedings of the corporate trustees occurring prior to June 29, 1934, the date the debtor's petition for reorganization was filed (R. 4).

Petitioner George E. Eddy, represented by petitioner Samuel Silbiger, appealed to the Circuit Court of Appeals from said decision; the New Corporation and two of the corporate trustees likewise appealed. The debtor's trustees did not appeal, and neither they nor their counsel, respondent George C. Wildermuth, took any part in establishing the complete jurisdiction of the District Court over said accounts (R. 4, 114). The Circuit Court of Appeals reversed the District Court (R. 4, 114) (Central Hanover Bank & Trust Co., et al., v. Bank of Manhattan Co., et al., 105 F. (2d) 130), and the District Court thereupon assumed complete jurisdiction and extended the time of the bond-

holders, and the New Corporation and/or the debtor's trustees to file objections to said accounts to October 2, 1939 (R. 4).

Objections to such accounts were duly filed by petitioner George E. Eddy and other bondholders, represented by the petitioner Samuel Silbiger; by certain bondholders, represented by respondent Joseph Nemerov; by the respondent, the New Corporation, represented by Charles M. McCarty, Esq., and by respondents Charles H. Kelby and Clifford S. Kelsey, Trustees of the Debtor, represented by the respondent George C. Wildermuth. All such objections were filed on behalf of the objectors and all bondholders, in the respective bond issues to which the objections related (R. 5). No objections to the accounts were filed by the Reconstruction Finance Corporation nor was it a bondholder, nor had it intervened in the accounting proceedings (R. 117).

Among the accounts so filed were five by City Bank Farmers Trust Company, as Trustee of Prudence Bonds Series A. A., Third, Fourth, Seventh and Seventeenth. Trial of the issues raised by all the accounts and exceptions and objections thereto were referred to a Special Master to hear and report thereon (R. 5).

The status of the debtor's trustees and the New Corporation as proper or necessary parties to the accounting proceedings was first challenged by petitioners George E. Eddy and Samuel Silbiger by a motion for declaratory judgment returnable April 1, 1940; the motion was argued and briefed, but before decision thereon, it was agreed between petitioner Samuel Silbiger and respondent George C. Wildermuth that all future steps in the accounting proceedings should be determined by conference of counsel for all objectors; that the tactics, strategy and procedure should be analyzed and agreed upon by all such counsel;

that but one attorney, Mr. Wildermuth, should be the examining or trial attorney, and that all testimony to be presented in support of the objections to the accounts should be offered on behalf of all the objectors and thereupon petitioners consented to and withdrew the motion for a declaratory judgment as to the status of the several objectors (R. 5-6). No agreement was entered into as to the right of counsel to compensation, or as to the allocation of any allowances for services in the event of a successful termination of the litigations (R. 90).

Protracted hearings were had and the trial of said five accountings extended from April, 1940 to June, 1942. It is undisputed that the factual data upon which all the objectors relied to support their objections were discovered by the New Corporation and their accountants (R. 73); that most of the clerical work throughout the proceedings was performed by the New Corporation and its counsel: that the necessary legal documents and briefs were drafted by counsel for the New Corporation (R. 19), and submitted to petitioner Samuel Silbiger, and respondents George C. Wildermuth and Joseph Nemerov for suggestions, amendments and editing, and after Mr. Wildermuth entered the armed service of our country, to respondent Charles H. Kelby in his stead (R. 76). The services of the New Corporation were not duplicated by the petitioner Samuel Silbiger-or by the respondents Kelby, Wildermuth and Nemerov. The services of said petitioner and said respondents were of the same general character and consisted of attending conferences, exploring the legal aspects of all phases of the questions to be considered, determining the tactics to be pursued, the character of the evidence to be introduced, the method of proof and competency of the evidence, the problems to be faced and how met, and independent research and analysis of the cases to be relied on and discussed in the various briefs, and attendance and participation in the actual trial of the issues.

In the rendition of such services petitioner Silbiger, and the respondents Wildermuth, later superseded by respondent Kelby, and the respondent Nemerov, devoted substantially the same time, effort, and ability (R. 6).

Pending the trial of said five accountings, the accounting trustee of Prudence Bonds 12th Series, moved to dismiss all objections filed therein, on the ground that (1) the objectors had no status to file their objections, and (2) that the objections were barred by the six-year statute of limitations. This motion was denied and an appeal taken by the corporate trustee and affirmed by the Circuit Court of Appeals (Manufacturer's Trust Company v. Kelby, et al, 125 F. (2nd) 650). In said case the Circuit Court did not resolve the question which of the objectors—the bondholders, the debtor's trustees, or the New Corporation had a standing to object (R. 9). When this Court denied certiorari, (316 U. S. 697, 86 L. E. 1156), City Bank Farmers Trust Company made active overtures for a settlement of the litigation of its five accounting proceedings and the negotiations resulted in a compromise approved by the District Court, whereby there was realized for the trust funds an aggregate amount of \$783,500.

 To the petitioner, Samuel Silbiger, Attorney for bondholders, (he requested \$42,566.67) 6,000.00

And to the New Corporation for disbursements (R. 8, 117) 29,195.94

The order was entered December 10, 1942 (R. 104).

No objections were filed by any bondholder to petitioner Silbiger's application. No objections were filed by any one to the application of Charles H. Kelby. The applications of petitioner Samuel Silbiger and the respondents George C. Wildermuth, Joseph Nemerov and Clifford S. Kelsey were opposed by the New Corporation and the Reconstruction Finance Corporation.

Prior to February, 1939, allowances for services in the Reorganization Proceeding proper had been made to respondents Charles H. Kelby and Clifford S. Kelsey, Trustees of the Debtor, of \$122,500.00; to their attorney, respondent George C. Wildermuth, \$130,000.00 and to petitioner Samuel Silbiger, \$5,000.00 (R. 110).

Notice of application by petitioners for leave to appeal was duly served on December 11, 1942 (R. 1), and such leave was denied on January 7, 1943 (R. 10, 92). Notice of appeal, as of right was duly served within forty days from the entry of said order, on January 15, 1943 (R. 108). The Circuit Court, on motion, dismissed said appeal because of lack of jurisdiction (R. 118).

#### Specification of Errors.

- 1. The Circuit Court of Appeals erred in holding that it was without jurisdiction to entertain petitioner's appeal taken as a right.
- 2. The Circuit Court of Appeals erred in refusing to grant leave to appeal, if an appeal did not lie as of right.

#### Reasons for Granting the Writ.

By refusing to allow petitioners to appeal, and by the dismissal of their appeal taken as of right, the Circuit Court has denied petitioners a review on the merits of the order of the District Court whereby trust funds equitably belonging to petitioner Eddy and other bondholders, to the extent of \$55,625.00, have been summarily taken from them and distributed to strangers, who have no interest in such trust funds.

The decision of the District Court in awarding allowances to parties who had no interest in the funds realized, is probably in conflict with the applicable law of New York State (Sec. 475 of the Judiciary Law), and the important principles of law established by this Court in *Trustees* v. *Greenough*, 105 U. S. 527; *Central R. R. Co.* v. *Pettus*, 113 U. S., 116.

The denial to petitioners of a review of the decision of the District Court presents an important question of Federal Law and Procedure, which has not been and should be settled by this Court.

The decision sought to be reviewed, so far as it involves the question of the status of the parties to file objections to the corporate trustees' accounts, is in conflict with applicable decisions of the courts of New York State. *Hart* v. *Goadby*, 138 App. Div. 160; 123 N. Y. S. 126.

The final determination by this Court of the questions involved is important, inasmuch as ten other accounting proceedings, collateral to the reorganization proceedings of Prudence Bond Corporation, are pending and undetermined in the District Court, and a decision by this Court will finally set at rest the controversial question, who are the proper parties and have the responsibility and the right to conduct and shape further proceedings below.

Wherefore, your petitioners respectfully request that a Writ of Certiorari should be granted as prayed.

Dated: April 5, 1943.

GEORGE E. EDDY, SAMUEL SILBIGER, Petitioners.

STATE OF NEW YORK, County of Kings, ss.:

George E. Eddy and Samuel Silbiger, petitioners herein, each being duly sworn, says that he has read and knows the contents of the within petition and the same are true in all respects as he verily believes.

GEORGE E. EDDY, SAMUEL SILBIGER.

Sworn to before me this 5th day of April, 1943.

RUTH GOODMAN,

Notary Public, Kings County.

Kings Co. Clk's No. 645, Reg. No. 251-G-5. Queens Co. Clks. No. 1599, Reg. No. 129-G-5. Nassau County Clerk's No. 13-G-45. Commission Expires March 30, 1945.

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

#### POINT I.

The appeal to the Circuit Court was properly taken as of right.

a. The allowances appealed from are not allowances as compensation for services rendered in a corporate reorganization proceeding under the Bankruptcy Act and regulated by Chapter X, Article XIII of the Bankruptcy Act.

b. The accounting proceeding below is not a proceeding in bankruptcy—it is a controversy arising out of a reorganization proceeding and supplementary thereto.

c. The allowances awarded below are allowances for costs taxable as between solicitor and client to enforce the attorney's charging lien on the proceeds of a cause of action enuring to the benefit not only of his client but to others.

d. The case of *Dickinson v. Cowen*, 309 U. S. 382 is inapplicable to the case at bar.

a.

A reading of Article XIII of Chapter X of the Bankruptcy Act, comprising sections 241 to 259 inclusive, clearly demonstrates that the compensation and allowances therein provided for are for officers of the Court, the attorneys for the debtor or petitioning creditors, other parties to the proceedings and creditors and stockholders and their attorneys, for services rendered "in a proceeding under this Chapter," obviously meaning services in connection with the administration of the bankruptcy estate in custodia legis, and in relation to the proposal of a plan of reorganization, its modification, acceptance or rejection; the confirmation of the plan or its rejection; and if the plan is con-

firmed, the distribution of the estate or its return to the debtor in accordance with the terms of the plan. When the Court confirms the plan and it is made effective and executed and consummated by a distribution of the property affected by the plan, and the Trustees of the Debtor, pursuant to the Court's order have transferred all their rights in and to the debtor's property to a new corporation formed pursuant to the plan, there no longer remains any bankruptcy estate in custodia legis; the confirmed plan superseded the bankruptcy reorganization proceeding: the powers of the trustees of the debtor terminate, notwithstanding any "catch all" reservation by the Court of jurisdiction to give such further authorizations and directions as may be necessary to make effective, consummate or carry out the plan or an order of the Court, or the failure to enter an order formally discharging the reorganization trustees and closing the estate.

In re Camden Rail & Harbor Terminal Corp., 35 Fed. Supp. 862;

Mallow Hotel Corporation, 29 Fed. Supp. 931; Bell v. Roberts, 112 F. (2d) 585;

The effect of the acceptance and confirmation of a plan and its consummation by the transfer of the "bankruptcy estate", as provided by the plan, is the same as that of a confirmation of a composition under the former Section 12 of the Bankruptcy Act, which provided for compositions, and the provisions of Section 70 (f), as it read prior to the enactment of the Chandler Act.

Section 70 (f) formerly read:

"Upon a confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him."

Under these provisions this Court held in Cumberland Glass Co. v. DeWitt, 237 U. S. 407, that the bankruptcy pro-

ceeding was superseded by the composition, and in Nassau Smelting & Refining Works v. Brightwood Bronze Foundry Co., 265 U. S. 269, 271, 44 S. Ct. 506, 507, 68 L. Ed. 1013, it said:

Composition is a settlement by the bankrupt with his creditors. In a measure, the composition supersedes, and is outside of the bankruptcy proceedings. Cumberland Glass Co. v. DeWitt, 237 U. S. 447, 454, 35 S. Ct., 636, 59 L. Ed. 1042. It originates in a voluntary offer by the bankrupt, and results in the main from voluntary acceptance by his creditors.

By the Chandler Act, Section 12 of the Bankruptcy Act has been elimited and Chapters X and XI, XII, XIII and XIV have been added to the Act and Section 70 (i), which replaces the former Section 70 (f) reads:

Upon the confirmation of an arrangement or plan, or at such later time as may be provided by the arrangement or plan, or in the order confirming the arrangement or plan, the title to the property dealt with shall revest in the bankrupt or debtor, or vest in such other person as may be provided by the arrangement or plan, or in the order confirming the arrangement or plan.

By a parity of reasoning then, upon the confirmation of the plan of reorganization of Prudence Bonds Corporation, property and property rights, claims and choses in action, which pending the reorganization were vested in the debtor's trustees, and which were not reorganized, revested by operation of law in the debtor or such other party as provided in the plan. The plan, like the former composition, superseded the bankruptcy proceeding, and the enforcement of any rights accruing under the plan or reserved and preserved from the operation of the plan would be outside of and not a part of the bankruptcy proceeding.

Berl v. Crutcher, 60 Fed. (2d) 440.

It would follow, therefore, that the allowances awarded in connection with the accounting proceedings below are not allowances for services rendered in a proceeding under Chapter X of the Bankruptcy Act and compensable out of the "Bankruptcy estate" within the provisions of Sections 241 to 250 inclusive of the Act.

b.

The accounting proceedings below, while not proceedings in a bankruptcy reorganization, nevertheless are controversies arising out of the reorganization proceedings over which the Federal Court and the State Court had concurrent jurisdiction. The Circuit Court recognized this to be so, for in the jurisdictional appeal, 105 Fed. (2d), 130, it suggested that the District Court, in its discretion, might not retain jurisdiction and might permit the accounting actions to be in another forum, the State Court or some other Federal Court, which, of course, would not be the case if such accountings were proceedings in bankruptcy over which the Bankruptcy Court had exclusive jurisdiction; and again, the Circuit Court recognized that such accountings were not proceedings in the bankruptcy reorganizing of the debtor in the case of Manufacturers Trust Company v. Kelby, 125 Fed. (2d) 650, wherein it stated that allowing the reorganization trustees to intervene in the accounting proceedings was a matter "for the decision of the District Judge within the discretion vested in him by Rule 24, (b) (2)." If such accountings were proceedings in the bankruptcy reorganization, the debtor's trustees would be necessary parties-in fact, the only necessary parties, and their right and duty to appear would be found within the provisions of the Bankruptcy Act and would not be predicated on a discretion lodged in the District Court by a rule extraneous to said Act, and the allowance of any counsel fees to petitioner Samuel Silbiger would be indefensible.

The compensation and allowances awarded below were for services rendered in accounting proceedings whereby the underlying security for the outstanding bonds in the five series with respect to which the accounts were rendered were substantially increased.

Support for the granting of any such allowances is not rooted in any provision of the Bankruptcy Act but in the broad rules of the common law and equity as established in the case law and preserved in New York State by Sec. 475 of the Judiciary Law, which confers upon an attorney a lien on a cause of action and any judgment or decree entered therein.

In re Heinsheimer, 214 N. Y. 361, 364.

The proceeding to establish and impress an attorney's lien is in no sense a motion in the reorganization proceeding of Prudence Bonds Corporation, Debtor, nor in the subsequent accounting proceedings, but it is a separate special proceeding.

Smith v. First National Bank of Albany, 103 Misc. 274, 170 N. Y. S. 127, Modified in 184 App. Div. 719, 172 N. Y. S. 595.

The establishment of an attorney's charging lien, and the awarding of costs as between solicitor and client and other parties to a proceeding has long been a recognized right in the Federal Courts. In the case of *Sprague* v. *Ticonic Bank*, 307 U. S. 161, the Court says:

The allowance of such costs in appropriate situations is part of the historic equity jurisdiction in federal courts. The suits 'in equity' of which these courts were given 'cognizance' ever since the First Judiciary Act, constituted that body of remedies, procedures and practices which theretofore have been evolved in the

English Court of Chancery, subject, of course, to modifications by Congress, \* \* \* To be sure, the usual case is one where through the complainant's efforts a fund is recovered in which others share. \* \* \*

d.

The case of Dickinson v. Cowan, 309 U.S. 382, involved a case where allowances were made for services rendered in a bankruptcy reorganization proceeding, and it was there held that an appeal from such an allowance could only be had when allowed in the discretion of the Circuit Court of Appeals within the meaning of Section 250 of the Bankruptcy Act. Section 250 of said Act creates an exception to the general rule whereby it was sought to unify the practice, so that appeals are taken by the service of a notice of appeal. The section applies only to appeals from orders granting allowances for services rendered in a reorganization proceeding and was intended to afford a prompt and summary disposition of a question of allowances in such proceeding so as not to delay the administration of the estate. It has no application to the case at bar, where, as pointed out above, the awards of compensation appealed from are not grounded upon any provisions of the Bankruptev Act.

#### POINT II.

The reorganization trustees had no interest in the trust estates involved in the accountings; therefore, any award to them and their counsel, chargeable to the trust fund, is, as matter of law, beyond the power and jurisdiction of the court and is indefensible.

The bondholders, the only parties beneficially interested in the funds created as a result of the accounting proceedings below, did not authorize or empower the reorganization trustees to appear in their behalf, or to engage counsel in their behalf, and thereby impliedly agree to compensate said trustees and their counsel out of such funds as may be realized through their services; nor is there any statutory authority conferred upon the reorganization trustees to so appear for and prosecute the claims of the bondholders. The bondholders had and exercised the right to appear themselves by counsel of their own choosing. Allowances can only be awarded to a real party in interest, and his counsel, when the party seeking the allowance has a joint interest with others in a common fund. If the party has no interest in the common fund, neither he nor his counsel should receive compensation payable therefrom.

Manufacturer's Trust Co. v. Kelby, 125 F. (2d) 650; Trustees v. Greenough, 105 U. S. S. 527; Central R. R. Co. v. Pettus, 113 U. S. 116; In re Gillespie, 190 Fed. 88.

The principle governing the allowance of compensation to parties or their attorneys, payable out of funds belonging to others, is succinctly stated in *Trustees* v. *Greenough*, 105 U. S. 527, in the following language:

One jointly interested with others in a common fund who, in good faith maintains necessary litigation to save it from waste, and secure its proper application, is entitled in equity to the reimbursement of his costs, as between solicitor and client, either out of the fund itself, or by proportionate contribution from those who receive the benefit of the litigation. (Emphasis ours.)

In re Gillespie, 190 Fed. 88, the Court said:

The only proper case where a court of equity or bankruptcy can award compensation to an attorney out of funds due to others than his client is where the attorney of a class has created or secured a fund and brought it into the custody of the Court which is to enure not only to the benefit of his client, but to others belonging to the class. (Emphasis ours.)

The funds realized in the accounting proceedings below, do not enure to the benefit of the reorganization trustees but solely to that of the bondholders. The reorganization trustees are not members of a class to whose benefit the funds created enure. They were not the substituted trustees and were not beneficiaries of the Trust Estates and had no derivative right to contest the accountings.

Hart v. Goadby, 138 App. Div. 160; 123 N. Y. S. 126.

Hart v. Goadby, 138 App. Div. 160; 123 N. Y. S. 126. Consequently, the allowances to the reorganization trustees in the sums of \$22,623 and \$500, and to their attorney in the sum of \$32,500, deprives the trust estates in which the bondholders are the sole beneficiaries of the sum of \$55,635, contrary to law and without due process of law.

#### POINT III.

Assuming Section 250 of the Bankruptcy Act is applicable in the case at bar, the Circuit Court abused its discretion in denying petitioners' application for an allowance of an appeal.

The District Court, in awarding allowances recompensed parties who had no interest or right to share in the subject matter of the litigation and erroneously accorded to the real parties in interest a relatively minor role. This is obviously contrary to law. *Trustees* v. *Greenough*, 105 U. S. 527, and other cases cited in Point II above.

There is a flagrant inconsistency in awarding \$55,635 to parties and their counsel when they have no status in the proceedings, and allowing but \$6,000 to counsel for bondholders who are the real interested parties. This inconsistency afforded a basis for a review of the decisions of the District Court on the merits, and for the Circuit Court in its discretion to have allowed petitioners to appeal.

#### Conclusion.

The petition for writs of certiorari should be granted. Dated: New York, April 5, 1943.

Samuel Silbiger, Counsel for Petitioners.





#### APPENDIX.

New York Judiciary Law, Section 475.

"From the commencement of an action or special proceeding in any court or before any state or federal department \* \* the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; \* \* The court upon the petition of the client or attorney may determine and enforce the lien."

(5546)





MAY 15 1943

## Supreme Court of the United States october term, 1942

Nos. 893-894

GEORGE E. EDDY and SAMUEL SILBIGER,

Petitioners,

VS.

CHARLES H. KELBY and CLIFFORD S. KELSEY, Trustees of the Debtor, PRUDENCE-BONDS CORPORATION (New Corporation), RECONSTRUCTION FINANCE CORPORATION, et al.

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

CHARLES H. KELBY,

Pro se and Counsel for the Trustees of Prudence-Bonds Corporation, Debtor, Geo. C. Wildermuth and Clifford S. Kelsey.

CHARLES M. McCarty,

Counsel for Prudence-Bonds

Corporation (New Corporation).



#### SUBJECT INDEX

I	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Argument:	
I. An appeal from the order on allowances could only be had in the discretion of the Circuit Court of Appeals	8
Conclusion	17
Appendix	18
CITATIONS	
Cases	
Barceloux, In re, 74 F. 2d 289.	15
Brooklyn Trust Company v. Kelby, 134 F. 2d 1054, 5	, 13
Central Hanover Bank & Trust Co., et al. v. President and Directors of the Manhattan Company, et al., 105 F. 2d 130	3, 13
Country Club Building Corp., In re, 128 F. 2d 36	11
Dickinson Industrial Site Inc. v. Cowin, 309 U. S. 382	, 16
Gross v. Bush Terminal Co., 105 F. 2d 930	11

PAGE	
Gross v. Irving Trust Co., 289 U. S. 342 16	,
Manufacturers Trust Company v. Kelby, 125 F. 2d 650, cert. denied, 316 U. S. 697	}
Matter of B. H. Inness Brown, et al., In re (N. Y. Court of Appeals, April 22, 1943), N. Y., not yet officially reported, Law Report News, April 27, 1943, Vol. 4, No. 2, p. 3	6
Meyer v. Kenmore Granville Hotel Co., 297 U. S. 166 10	J
Paramount-Publix Corp., In re, 82 F. 2d 230 1	0
Prudence-Bonds Corporation, In re, 111 F. 2d 37, reversed, 311 U. S. 579	1
Company, U.S. , of L. Ed. 101	11
Shulman v. Wilson-Sheridan Hotel Co., 301 U. S. 172 1	6
	11
Statutes	
Bankruptey Act, Sec. 25 (a) 2,7,	11
Bankruptey Act, Sec. 250	16
N. Y. State Judiciary Law, Sec. 475	15
U. S. Code, Title 28, Sec. 230	11
U. S. Code, Title 28, Sec. 250	1
U.S. Code, Title 28, Sec. 347	-

### Supreme Court of the United States october term, 1942

Nos. 893-894

GEORGE E. EDDY and SAMUEL SILBIGER,

Petitioners.

VS.

Charles H. Kelby and Clifford S. Kelsey, Trustees of the Debtor, Prudence-Bonds Corporation (New Corporation), Reconstruction Finance Corporation, et al.

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

#### **Opinions Below**

The Circuit Court of Appeals rendered no opinions on the motion for the allowance of the appeal or on the motion to dismiss the appeal taken as of right.

#### Jurisdiction

The order of the Circuit Court of Appeals denying leave to appeal was entered January 7, 1943 (R. 92). The order of the Circuit Court of Appeals dismissing the appeal was entered March 2, 1943 (R. 118).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Section 347).

#### Questions Presented

In order to make effective, consummate and carry out Plans confirmed in a proceeding pending before it for the reorganization of a corporation under Sec. 77B of the Bankruptcy Act, the bankruptcy court authorized and directed Corporate Trustees of the Debtor's bond issues to account in the reorganization proceeding. Services were performed and expenses incurred in connection with certain of such accountings. By order made in the reorganization proceeding on December 10, 1942, the bankruptcy court awarded allowances for such services to the reorganization Trustees of the Debtor and their attorney, to petitioner Silbiger and another attorney for individual bondholders, and also awarded an allowance for expenses to the new corporation formed under the confirmed Plans. The Circuit Court of Appeals denied an application by petitioners for leave to appeal from such order. Thereafter and within the time provided by Sec. 25(a) of the Bankruptcy Act, petitioners sought to appeal as a matter of right. The Circuit Court of Appeals dismissed the appeal. The question is:

Was the appeal from such order on allowances one which could be had only in the discretion of the Circuit Court of Appeals under Sec. 250 of the Bankruptcy Act? 1

#### Statement

The order of the bankruptcy court, from which petitioners sought to appeal, was made in the proceeding for the reorganization of Prudence-Bonds Corporation, Debtor, under Sec. 77B of the Bankruptcy Act (R. 104). Although

<sup>&</sup>lt;sup>1</sup> In addition to seeking a review of the order dismissing the appeal taken as of right, Petitioners also seek a review of the order denying their application for leave to appeal. The "Questions Presented" in the Petition, however, do not include any question as to whether the Circuit Court of Appeals abused its discretion in denying the motion for leave to appeal.

Plans have been confirmed (R. 96), the bankrupt estate is still in the process of administration, in that the reorganization Trustees of the Debtor and other parties are engaged in compelling restoration of trust funds securing the Debtor's bonds (R. 53, 58). Accordingly, no report has been filed showing that the Plans have been carried out and no final decree has been entered closing the case (R. 103).

When its petition for reorganization was approved, the Debtor corporation had outstanding eighteen Series of First Mortgage-Collateral Bonds (R. 95). Each Series was secured by a separate Trust Agreement made by the Debtor to a bank, as Trustee, under which bonds and mortgages and other securities were assigned and delivered to each Trustee as a Trust Fund for the benefit of the bondholders (R. 95-96). Eleven banks were Trustees under these Trust Agreements, one of which was City Bank Farmers Trust Company, Trustee of five of the eighteen Series of Bonds (R. 96).

A separate Plan of Reorganization for each Series of Bonds and a General Plan of Reorganization were confirmed (R. 96). The General Plan provided, in part, for the formation of a new corporation, with the same name as the Debtor, to be wholly owned by the bondholders, the Debtor having been found to be insolvent (R. 96). The separate Series Plans provided, among other things, for Modified or Supplemental Trust Agreements (R. 96).

By the orders of confirmation, the bankruptcy court reserved jurisdiction to give such further authorization and directions as might be necessary or proper in order to make effective, consummate and carry out the Plans and the orders of the bankruptcy court relating thereto (R. 96-97).

The bankruptcy court, as part of the proceedings to make effective and carry out the confirmed Plans, made an order on April 27, 1938,<sup>2</sup> which approved the appointment of a

<sup>&</sup>lt;sup>2</sup> The order of April 27, 1938, applied in most respects to 17 of the 18 Series of Bonds. A similar order was made on June 6, 1938, with respect to the one remaining Series (R. 3-4, 113).

particular trust company as the new Corporate Trustee for all eighteen Series of Bonds; approved the form of Supplemental Trust Agreements to be made by the New Corporation to the new Corporate Trustee; authorized and directed the old Corporate Trustees to transfer their respective Trust Funds to the new Corporate Trustee; and authorized and directed the Debtor and its Trustees in bankruptey, to transfer their right, title and interest in the Trust Funds to the New Corporation<sup>3</sup> (R. 3, 97, 111-112). Such order further authorized and directed the old Corporate Trustees to:

"\* \* prepare and file in this proceeding, an account of their respective acts and proceedings under the Original Trust Agreement pertaining to their respective Series of Bonds \* \* \*, and to make an appropriate application for the judicial settlement herein of said accounts \* \* \* " (R. 97).

Each of the old Corporate Trustees, thereafter, filed in the reorganization proceeding, an account of its acts as such Trustee since the inception of its particular Trust or Trusts and petitioned the bankruptcy court for an order taking, determining and judicially settling its accounts and releasing and discharging it from all responsibility with respect to its acts as Trustee and with respect to all matters contained in its accounts (R. 98). Upon such accounts and petitions, the bankruptcy court Judge signed orders to show cause, entitled in the reorganization proceeding, directing all parties in interest to show cause why the relief prayed for should not be granted (R. 98).

Reversing the District Court on a question later raised as to jurisdiction, the Circuit Court of Appeals, in uphold-

<sup>&</sup>lt;sup>3</sup> In *Brooklyn Trust Company* v. *Kelby*, 134 F. 2d 105, 109, involving a later phase of the Corporate Trustees' accountings, the Circuit Court of Appeals noted that when "the debtor and its trustees in bankruptcy, pursuant to the court's order, transferred all their interests in the trust funds to the new company, neither the new company nor the trustees in bankruptcy nor the court were aware of any wrongful acts on the part of the old corporate trustees".

ing the jurisdiction of the bankruptcy court over the accounts and objections thereto, unanimously decided that the liability of the old Corporate Trustees for any diversion or waste of the Trust Funds would be to "restore the waste of assets" or to "restore the res"; that recoveries on the objections would go back into the Trust Funds or res; and that the liability of the old Corporate Trustees, as well as the right and remedy to compel restoration of the res, constituted property of the Debtor within the meaning of the Bankruptcy Act (Central Hanover Bank & Trust Co., et al. v. President and Directors of the Manhattan Company, et al., 105 F. 2d 130).4

Upon the decision and mandate of the Circuit Court of Appeals on such appeal, the bankruptcy court, by an order made in the reorganization proceeding on July 12, 1939, decreed that "to make effective, consummate and carry out the" confirmed Plans, "this Court in the above entitled proceedings, has and hereby takes, full, complete and exclusive jurisdiction to take, determine and judicially settle" the accounts of the old Corporate Trustees and to hear and determine all objections thereto (R. 99). Such order further provided, that any objections of the New Corporation or of the reorganization Trustees of the Debtor, be

Subsequent to the filing of the petition for certiorari here under consideration, Brooklyn Trust Company filed a petition for certiorari to review the decision of the Circuit Court of Appeals in the *Brooklyn Trust Company* case.

<sup>&</sup>lt;sup>4</sup> The decision of the Circuit Court of Appeals in the Central Hanover case cited above, has been reaffirmed and restated by the Circuit Court of Appeals on two occasions in passing upon subsequent appeals from orders of the bankruptcy court relating to the accountings by the old Corporate Trustees; first in Manufacturers Trust Company v. Kelby, 125 F. 2d 650, and again at length in Brooklyn Trust Company v. Kelby, 134 F. 2d 105. In the Manufacturers Trust Company case, this Court denied certiorari (316 U. S. 697) and in the Brooklyn Trust Company case, the Circuit Court of Appeals noted the fact that such petition for certiorari "asked reversal not only of our decision in the Manufacturers Trust case but also of our previous decision, as to jurisdiction, in the Central Hanover case" (134 F. 2d 105, 110).

deemed and constituted to be made on their own behalfs and on behalf of the bondholders, and authorized bondholders to join in and adopt any such objections (R. 51-52). By such order, the bankruptcy court, again specifically reserved and retained jurisdiction to "make effective, consummate and carry out the" confirmed Plans of

Reorganization (R. 99).

Among the accounts of the old Corporate Trustees which, together with objections thereto, were thereafter the subject of hearings before a Special Master appointed by the bankruptcy court, were the five accounts of City Bank Farmers Trust Company, as Trustee under the original Trust Agreements securing five of the Debtor's eighteen Series of Bonds (R. 100). Objections to each of such accounts were filed by the New Corporation and the reorganization Trustees of the Debtor. Three bondholders, through their attorney petitioner Silbiger, filed objections to the accounts in four of the five Series, one of which bondholders was petitioner Eddy, who had filed objections to the accounts in two Series. Objections to some of such accounts were also filed by three other bondholders, through their attorney Joseph Nemerov, Esq. (R. 100).

All objections to the five accounts of City Bank Farmers Trust Company, as Trustee, were subsequently compromised and settled with the approval of the bankrutcy court by an order made in the reorganization proceeding on August 27, 1942 (R. 100-101). By such settlement, City Bank Farmers Trust Company, individually, paid into the five Trust Funds for which it was Trustee, \$650,000 cash and in addition turned into one of the Trust Funds, a share in a certain mortgage, which share had cost City Bank Farmers Trust Company, individually, the sum of \$133,500 (R. 100). The order approving such settlement, which was made after a hearing on notice to all bondholders, intervenors and parties in interest, provided for the manner and time of filing applications for allowances for services and expenses in connection with the accountings by City Bank Farmers Trust Company, the time and manner of filing objections to applications for such allowances, and fixed a date for a hearing before the bankruptcy court on the applications and objections (R. 101-103).

Applications for allowances for such services were thereafter filed by the reorganization Trustees of the Debtor, their attorney, petitioner Silbiger and by Joseph Nemerov, Esq. (R. 15). An application for an allowance for expenses was filed by the New Corporation (R. 15). Neither petitioner Eddy, who did not apply for an allowance, nor petitioner Silbiger, filed objections to any of the allowances requested, although they had due notice of the time to file objections and of the hearing on the applications for allowances (R. 14). Objections to allowances requested were, however, filed by the New Corporation and by Reconstruction Finance Corporation, an intervenor in the reorganization proceeding (R. 15-68, 71-86).

The order of the bankruptcy court, which petitioners sought to appeal from, passed upon the applications for such allowances and the objections thereto (R. 103). Such order was made in the reorganization proceeding on December 10, 1942 (R. 104). Petitioner Silbiger had applied for an allowance of \$42,566.67 and was awarded \$6,000 (R. 107).

Petitioners Silbiger and Eddy applied to the Circuit Court of Appeals for leave to appeal from the said order on allowances (R. 1-12). Such application was denied by order of January 7, 1943 (R. 109). Thereafter and within the time provided by Sec. 25(a) of the Bankruptcy Act, petitioners served a notice of appeal and attempted to appeal as of right (R. 108). On motion, the Circuit Court of Appeals dismissed such appeal by order of March 2, 1943 (R. 118).

An appeal from the order on allowances could only be had in the discretion of the Circuit Court of Appeals.

In Dickinson Industrial Site Inc. v. Cowin, 309 U. S. 382, this Court decided that under Section 250 of the Bankruptcy Act appeals from orders on allowances in corporate reorganizations "may be had only at the discretion of the Circuit Court of Appeals".

Petitioners contend, however, that the rule of the Dickinson case is inapplicable to the order on allowances here involved. Their theory appears to be that the services and expenses for which the awards were made were not rendered or incurred in connection with the plan or the proceeding within the meaning of the Bankruptcy Act.<sup>5</sup>

Petitioners' alleged principal reason for granting certiorari is the suggestion that unless they are permitted to appeal, trust funds belonging to bondholders "will have been summarily taken from them and distributed to strangers, who have no interest in such trust funds" (petition, p. 10). But the "strangers" to whom they refer are the Debtor's trustees in bankruptcy and their counsel! Not so long ago, however, petitioners regarded the Debtor's Trustees as anything but "strangers". They said in a brief in the Circuit Court of Appeals in the Central Hanover case, supra:

"Title to the Claims of the Bondholders Predicated on the Mismanagement and Improper Diversion of the Trust Funds or *Res*, Vested in the Debtor's Trustees as Assets of This Estate and a Right of Action Accrued to Such Trustees to Enforce Such Claims and Recover the Diverted Funds or Their Equivalent for Proper Distribution Among the Creditors Entitled to Share Therein" (R. 91).

<sup>&</sup>lt;sup>5</sup> This is not a case where a party has mistakenly pursued the wrong method of appeal. Petitioners attempted to appeal as a matter of right, only after leave to appeal had been denied.

Petitioners now pretend to be greatly concerned about a fancied wrong to bondholders resulting from the granting of allowances to the reorganization Trustees and their counsel. They did not, however, even object to any of the applications in the District Court, although they had due notice of them (R. 14, 69, 87, 89).

The fact is petitioners are not at all concerned about the bondholders. They are trying to obtain for petitioner Silbiger an allowance many times the amount which the District Court decided he was entitled to. And to achieve the result, they argued in the Circuit Court of Appeals that the total of all allowances was inadequate (R. 12).

Petitioners' real view as to the status of the reorganization Trustees was shown when they wrote the quotation set forth above and when later they joined with such Trustees (whom they now call "strangers" and "volunteers"), and with other respondents in a brief filed in this court in which it was argued that the bankruptcy court in the Debtor's reorganization proceeding had undoubted jurisdiction to settle the Corporate Trustees' accounts and to pass upon objections thereto.7 Indeed, petitioner Silbiger has stated that he agreed that counsel for the reorganization Trustees of the Debtor should conduct the trial of the objections to the Corporate Trustees' accounts (R. 6, 90). Despite such statement, he now has the temerity to contend that the reorganization Trustees and their counsel should not have been paid for work which he himself agreed they should do.

<sup>&</sup>lt;sup>6</sup> The total of the allowances awarded by the District Court was \$69,635 for services and \$29,195.94 for expenses, or \$98,830.94 (R. 106). Petitioner Silbiger had contended that the total of the awards should be \$127,700 for services and \$29,195.94 for expenses, or \$156,895.94, and that he, petitioner Silbiger, should have been awarded \$42,566.67 or one-third of his suggested total of \$127,700 for services (R. 8).

<sup>&</sup>lt;sup>7</sup> Respondents' brief in opposition to petition for certiorari in the Manufacturers Trust Company case, supra.

At all events, the Circuit Court of Appeals in the Manufacturers Trust Company case, supra, affirmed an order of the District Court decreeing that the reorganization Trustees of the Debtor were necessary parties to the accounting proceedings. And as previously noted, this Court denied certiorari in such case.

Petitioners apparently believe that Section 250 should be restricted so as to exclude from its application appeals from orders granting or denying allowances for services or expenses in connection with proceedings had in the reorganization court in order to make effective and carry out a confirmed plan. An order confirming a plan, however, is not, as petitioners suggest, analogous to a confirmation of a composition. The latter operates as a discharge, the former is but a step in the administration of the Debtor's estate; in a corporate reorganization a discharge is effected not by confirmation of a plan, but by the final decree (Meyer v. Kenmore Grantville Hotel Co., 297 U. S. 166, 167). As stated in In re Paramount-Publix Corp., 82 F. 2d 230, 232-233:

"However, as long as there is an asset, tangible or intangible, in the court's control, the estate may be considered to be in administration. \* \* \* There are assets of the estate outstanding and in the court's control. Trustees are obligated to collect these assets under the direction of the court by section 47 a (2) of the Bankruptcy Act, as amended (11 U. S. C. A. Sec. 75(a) (2)), and until this duty is discharged and the assets collected are out of the court's hands the estate is still in administration."

Since the decision of this Court in the *Dickinson* case, the Circuit Courts of Appeals have uniformly decided that Sec. 250 applies to all orders on allowances in corporate reorganizations. They have consistently declined to engraft exceptions on the rule that appeals from such orders may only be had in their discretion.

In re Von Kozlow Realty Co., 116 F. 2d 673, the appellants contended that the order on appeal was not an order on allowances, but one fixing the amount of a claimed lien. The Court rejected such contentions, held that Section 250 was applicable, and dismissed the appeal. Similar contentions were rejected in In re Prudence-Bonds Corporation, 111 F. 2d 37, 41 (reversed on other grounds, 311 U. S. 579), where Corporate Trustees of this Debtor's bond issues contended that their appeals from an order awarding them allowances were not governed by Section 250, since under the Trust Agreements they had liens on the Trust Funds for their services and expenses. Cf. Gross v. Bush Terminal Co., 105 F. 2d 930; Reconstruction Finance Corporation v. Bankers Trust Company, U. S. , 87 L. Ed. 481.

In re Country Club Bldg. Corp., 128 F. 2d 36, is another illustration of an unsuccessful attempt to avoid the applicability of Section 250. In that case an allowance had been made to a Special Master for services. The allowance was paid by the debtor, but was chargeable against appellant. The debtor obtained an order awarding judgment against appellant for reimbursement of the amount paid. Appellant attempted to appeal from such order as a matter of right, more than thirty (30) days after the entry of the order. Appellant there like petitioners here, contended the appeal was governed by the Judicial Code, 28 U. S. C. A. Section 230, and not by Sections 25 (a) and 250 of the Bankruptey Act. In rejecting such contentions and dismissing the appeal, the Circuit Court of Appeals stated (pp. 37-38):

"Appellant tacitly concedes that these provisions (Sec. 250, Sec. 25,a) are controlling, if applicable, but denies their applicability to the instant situation. In order to escape the former (Sec. 250), it is argued that the order appealed from was not 'making or refusing to make allowances of compensation or reimbursement' and, to escape the latter (Sec. 25,a) argues that the order appealed from was not entered in the reorganization proceeding.

Was this an order within the statutory language 'making or refusing to make allowances of compensation or reimbursement'? We think it was. \* \* \* Such being the case, Section 250 is applicable and the appeal could have been properly taken only by permis-

sion of this court.

We also think plaintiff is in error in his contention that he had three months to perfect his appeal, as is provided by Section 230, 28 U.S. C. A., rather than the thirty day period provided by Section 48 sub. a, 11 U. S. C. A. This is dependent, of course, upon the premise as to whether the order appealed from was a final judgment within the meaning of the former provision, or an order in the reorganization proceeding within the meaning of the latter provision.

(4) It is true, as pointed out by appellant, that a final decree was entered in the reorganization proceeding December 2, 1938, prior to the entry of the order This decree, however, expressly reappealed from. served jurisdiction for the 'purpose of determining the question of whether or not costs should be assessed against John Murphy (instant appellant) et al., bondholder claimants herein, in the Matter of the Petition of Murphy et al. v. Bloom et al. It is true also that at the time of the entry of this decree the costs included in the order appealed from had been allowed and paid Notwithstanding this, however, we by the debtor. think the reservation in the final decree was such that the court retained jurisdiction of an action seeking reimbursement from appellant for such payment by the debtor. The order appealed from is therefore one entered in the reorganization proceeding, an appeal from which was only allowable within thirty days from the date of its entry.

It follows from what we have said that this court is without jurisdiction to entertain the appeal and for that reason appellee's motion to dismiss is allowed."

Here no final decree has been entered and by the orders of confirmation the bankruptcy court reserved appropriate jurisdiction to carry out the Plans (R. 103, 96, 97, 99, 101). The order on allowances was made and entered in the reorganization proceeding (R. 104). Under an order of the

bankruptcy court, the allowance applications were filed, notice given and a hearing thereon held in accordance with the provisions of the Bankruptcy Act and the Rules of the District Court (R. 102-103). The money and property recovered on the objections to the Corporate Trustees' accounts was paid into the Trust Funds securing the Debtor's reorganized bonds (R. 16-17). The allowances awarded, including the award to petitioner Silbiger, were by the order of the bankruptcy court, directed to be paid out of such Trust Funds (R. 106). The services and expenses for which the awards were made, were rendered and incurred in connection with the accountings by Corporate Trustees for their acts with respect to such Trust Funds (R. 101, 104-105). The bankruptev court took exclusive jurisdiction over such accountings for the express purpose of making effective, consummating and carrying out the confirmed Plans (R. 99). Such jurisdiction has been upheld on three occasions by the Circuit Court of Appeals (Central Hanover Bank & Trust Co. et al. v. President and Directors of the Manhattan Company, et al.; Manufacturers Trust Company v. Kelby: Brooklyn Trust Company v. Kelby, supra). And as pointed out supra page 5, in the Manufacturers Trust Company case, one of the accounting Corporate Trustees sought certiorari to review such decision and also the earlier decision in the Central Hanover case. In the Brooklyn Trust Company case, also involving the accountings in the reorganization court, the Circuit Court of Appeals stated (134 F. 2d 110-112):

"Since, despite our earlier decisions in the Central Hanover and Manufacturers Trust cases, the appellant on the present appeal again raises the question of the jurisdiction of the bankruptcy court over the restoration actions, it is desirable here to restate, somewhat more amply, our reasons for sustaining its jurisdiction: One of the primary purposes of a reorganization proceeding under Sec. 77B (as distinguished from ordinary bankruptcy) is to bring about an adjustment of secured debts. The jurisdiction to con-

firm a reorganization plan therefore extends to property securing obligations owing to secured creditors even if the debtor no longer has an 'equity' in that property. As the court has jurisdiction of such property, it also has jurisdiction of trustees who are holding it for the secured creditors. Nor is this jurisdiction left to inference: Under Sec. 77B, sub. b(9) a plan 'shall provide adequate means for' its 'execution' which means 'may include \* \* \* the satisfaction or modification of liens, indentures, or other similar instruments'; and Sec. 77B sub. h provides that, upon confirmation of a plan, the court may direct 'the trustee of any obligation of the debtor \* \* \* to make' any necessary transfer or conveyance of any property dealt with by the plan. Necessarily, those powers include the power to direct such a trustee to convey the trust property to a new trustee; it follows that to require a full accounting for that trustee's earlier conduct with reference to such trust property is an inherent part of the judicial administration of the estate in the court's legal custody, for it is necessary, in order to see to it that the plan is fully carried out, to ensure that the new trustee for secured creditors receives all the trust funds. The exercise of the court's power to compel such an old trustee to restore trust assets, lost by its negligent conduct, concerns the res itself and is, therefore, quasi in rem. Princess Lida v. Thompson, 305 U. S. 456, 462, 465, 466, 59 S. Ct. 275, 83 L. Ed. 285; Mandeville v. Canterbury, 63 S. Ct. 472, 87 L. The claim for restitution is part of the estate within the court's jurisdiction; the old trustee's liability is as much a part of the res to be administered as any other part; to make the old trustee account is as much the court's duty as to make it turn the securities in its possession over to the new trustee. sequently, in the case at bar, the old corporate trustees were parties to the reorganization proceeding and not 'adverse claimants'; since they were not 'adverse claimants', there was no need to bring plenary suits against them, although, as we said in the Central Hanover case, 2 Cir., 105 F. 2d 130, 132, the bankruptcy court, in its discretion, could have directed the bringing of such But no matter where brought, and plenary suits. whether or not each such restoration action be considered as a suit against one of the old trustees or as a suit begun by its own petition for adjudication of its liabilities, in any event the claims asserted against it were part of the trust fund or *res* in the custody and entitled to the protection of the reorganization court."

It is clear, therefore, that the bankruptcy court has undoubted jurisdiction over the accountings by the Corporate Trustees. It is also clear that such accountings were not in the nature of plenary suits. But even if they were, Section 250 would apply to the order on allowances.

In cases decided under the former Bankruptey Act, involving services in plenary suits to set aside fraudulent transfers, allowances for such services were passed upon by the bankruptcy court in the bankruptcy proceeding. And orders on such allowances were administrative orders governed by former Section 24b (11 U. S. C. A., Sec. 47b), and were appealable only in the discretion of the Circuit Courts of Appeals. Such was the situation in *In re Barceloux*, 74 F. 2d 289, where the Court stated, page 294:

"On the question of attorney fees, the District Court must be sustained for another reason. The allowance was an administrative order appealable only under section 24b (11 U. S. C. A., Sec. 47b). Under this section our review is limited to the question of law—whether there was a manifest abuse of discretion by the District Court."

The New York Court of Appeals has held only recently, that where a plenary suit was brought in the State Court to recover on claims belonging to a bankrupt estate, the bankruptcy court has exclusive jurisdiction to pass upon allowances, and that attorneys have no lien for their services under Section 475 of the Judiciary Law of the State of New York. In the Matter of B. H. Inness Brown, et al., \_\_\_\_\_\_ N. Y. \_\_\_\_\_, decided April 22, 1943, not yet officially reported, Law Report News, April 27, 1943, Volume 4, No. 2, page 3. The Court of Appeals stated:

"\* \* Not only does chapter 10 specifically confer exclusive jurisdiction of the debtor and its property

upon the Federal court, but in addition there is specifically given exclusive jurisdiction to determine costs, expenses and reasonable compensation for services rendered in reorganization proceedings (Bankruptcy Act, Secs. 62, 241-250), and there are set forth numerous meticulous provisions designed to make effective the control of the federal court over fees and expenses.

Where attorneys have been appointed in a reorganization proceeding to deal with an asset belonging to the debtor, it is difficult to see how a provision of the New York Judiciary Law (Sec. 475) could constitutionally provide for a lien upon these assets. (Kalb v. Fuerstein, 308 U. S. 433, 439.)

The control provided by the Bankruptcy Act over costs and expenses of administration, particularly including fees and allowances, is an important part of the entire reorganization and bankruptcy system."

The instant case is even stronger than the Matter of B. H. Inness Brown, et al., since the services and expenses for which the awards were made were rendered and incurred in the bankruptcy court and not in the state court.

In Shulman v. Wilson-Sheridan Hotel Co., 301 U. S. 172, the allowances involved were for legal services in a state court foreclosure suit antedating the Sec. 77B proceedings. The awards were made after confirmation of a plan. This Court held that under former Sec. 24(b), appeal from the allowance order could only be had in the discretion of the appellate court. Cf. Gross v. Irving Trust Co., 289 U. S. 342. And in the Dickinson case, this Court said that the history of Section 250, indicated that the purpose of the Section was "to carry over into the new act the rule of" the Shulman case (309 U.S. 382, 385).

The purpose of Section 250, as this Court decided in the Dickinson case is to avoid frivolous appeals from orders on allowances. Petitioners have not advanced any sound reason for making an exception in this case.

#### H

## CONCLUSION

The petition for writs of certiorari should be denied.

Respectfully submitted,

CHARLES H. KELBY,

Pro se and Counsel for the Trustees of Prudence-Bonds Corporation, Debtor, Geo. C. Wildermuth and Clifford S. Kelsey.

CHARLES M. McCarty,
Counsel for Prudence-Bonds
Corporation (New Corporation).

May 14, 1943.

### APPENDIX

The Bankruptcy Act, as amended by the Act of June 22, 1938 (c. 575, 52 Stat. 840; 11 U. S. C. Supp. V, Sec. 650):

"Sec. 250. Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."





24

MAY 20 1943

CEARLES ELMONE GROVLE

IN THE

# Supreme Court of the United States

October Term, 1942

Nos. 893-894

GEORGE E. EDDY and SAMUEL SILBIGER.

Petitioners.

-against-

CHARLES H. KELBY and CLIFFORD S. KELSEY, Trustees of The Debtor, PRUDENCE BONDS CORPORATION (New Corporation), RECONSTRUCTION FINANCE CORPORATION, et al.

Respondents.

## REPLY BRIEF ON BEHALF OF PETITIONERS

SAMUEL SILBIGER, Counsel for Petitioners.



# TABLE OF CONTENTS

	PAGE
I. As to Respondents' contention that an appeal from the order on allowances could only be had in the discretion of the Circuit Court	1
II. As to the District Court's post-reorganization jurisdiction	_
Jan 1941	8
Cases Cited:	
Brooklyn Trust Co. v. Kelby, 134 F. 2d 1055,	8, 9
Central Hanover Bank & Trust Co. v. Bank of Man-	
hattan, 105 F. 2d 130	5, 9
F. 2d 299 (C. C. A. 2)	10
Collett v. Adams, 249 U. S. 545	7
Country Club Bldg. Corp., In re, 128 F. 2d 36	2
Dickinson Industrial Site, Inc., 309 U.S. 382	1
Erie v. Tompkins, 304 U. S. 64	9
Flatbush Ave. Nevins St. Corp., Re, 133 F. 2d 766	
(C. C. A. 2)	10
Gross v. Bush Terminal Co., 105 F. 2d 930	5
Gross v. Irving Trust Co., 289 U. S. 342	6
Matter of B. H. Inness Brown, In the, N. Y.	5, 9
not officially reported, Law Report News, April 27, 1943	6

	PAGE
Paramount-Publix Corp., 82 F. 2d 230	5
Prudence-Bonds Corporation, In re, 111 F. 2d 37, 41	2, 3
Reconstruction Finance Corp. v. Bankers Trust Com-	
pany, decided February 8th, 1943 U.S., 87 L. ED. 481, 63 S. Ct. 515	5
Schoenthal v. Irving Trust Co., 287 U. S. 92	7
Sherman v. Buckley, 119 F. 2d 280, cert. denied 314 U. S. 657	6
Taylor v. Voss, 271 U. S. 176	7
Von Kozlow Realty Co., 116 F. 2d 673	. 2

# Supreme Court of the United States

October Term, 1942

Nos. 893-894

GEORGE E. EDDY and SAMUEL SILBIGER,

Petitioners,

-against-

CHARLES H. KELBY and CLIFFORD S. KELSEY, Trustees of The Debtor, PRUDENCE BONDS CORPORATION (New Corporation), RECONSTRUCTION FINANCE CORPORATION, et al.

Respondents.

# REPLY BRIEF ON BEHALF OF PETITIONERS

I.

As to Respondents' contention that an appeal from the order on allowances could only be had in the discretion of the Circuit Court.

Respondents erroneously assume the premise that the allowances made herein were for services rendered in a corporate reorganization proceeding and then cite *Dickinson Industrial Site, Inc.*, 309 U. S. 382, as authority to support their contention, that an appeal from the order on such allowances is permissible only in the discretion of the Circuit Court. There is no dispute as to the applicability of the *Dickinson* case to awards of allowances for services rendered in a reorganization proceeding, but petitioners

contend that in the instant case the services rewarded were rendered in controversies supplemental to and growing out of the reorganization proceeding and the jurisdiction of the District Court over the accounting proceedings was complementary to the confirmed plan and auxiliary to it.

The facts in re Von Kozlow Realty Co., 116 F. 2d 673, In re Country Club Bldg. Corp., 128 F. 2d 36, and In re Prudence-Bonds Corporation, 111 F. 2d 37, 41, all disclose that the services rendered were in the reorganization proceedings and are not germane to the issues in the case at bar.

In re Von Kozlow Realty Co., supra, the appeal arose out of applications for trustees', attorneys', engineers' and other parties' fees and expenses allowed by the Court in connection with the attempted corporate reorganization under Section 77B of the Bankruptcy Act. There never was any reorganization and the petition was dismissed because of the inability to obtain the necessary consents to the plan. Thereafter, through foreclosure in the State Court the realty constituting the only asset of the debtor was conveyed to appellee, holder of a lien. The fees for services in the reorganization were allowed subject to the rights of the appellee. Payment was apparently made junior to the appellee's interest. Appellee moved to dismiss the appeal on the ground that leave to appeal had not been obtained. The Court said: "Clearly if the appeal is from an order making or refusing allowances in a reorganization proceeding, under the Chandler Act application must be made to this Court for the allowance of the appeal."

Obviously, the services in that case were rendered in connection with the proposed plan and prior to the confirmation or rejection of the plan and came definitely within the express provision of Section 243 of the Chandler Act which provides:

"\* \* \* In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto."

The allowances involved in re Prudence-Bonds Corporation, supra, were likewise for services in the bankruptcy reorganization proceeding—while the debtor's estate was in the custody of the bankruptcy court and title thereto was in the debtor's trustees from the filing of the petition in 1934 up to the time the plan was confirmed, and the Court surrendered its custody in 1938, and the debtor's trustees transferred all their title to the estate pursuant to the order of the Court. Those were the allowances made in the orders for services concededly rendered in the reorganization proceeding and referred to in paragraph 4, page 110 of the record.

In lieu of meeting squarely the issues in this case respondents attempt to becloud the issues by quoting, on page 8 of their brief, an excerpt from the brief submitted by petitioners to support the complete jurisdiction of the District Court over the accounting filed by the trustees, and disparagingly suggest that such excerpt (dissociated from the context of the brief), represents petitioners' real views as to the status of the reorganization trustees and that such views are inconsistent with their contentions now advanced by them. Such is not the case—and the supposed inconsistency can exist only in the minds of respondents because they ignore the change in the status of the debtor's trustees wrought by the confirmation of the plan of reorganization and the transfer by the debtor's trustees of all their title in the estate to the New Corporation pursuant to the plan of reorganization.

Petitioners do not dispute but reassert and now claim that upon the filing of debtor's petition for reorganization, its approval by the Court and the appointment and qualification of the trustees of the debtor, the title to the claims of the bondholders, predicated on the mismanagement and improper diversion of the trust funds or res vested in the debtor's trustees as assets of the bankruptcy estate, and the right of action to enforce such claims and recover the diverted funds accrued to and vested solely in the reorganization trustees. But that was in June, 1934.

From 1934 and until the confirmation of the plan of reorganization in 1938, the debtor's trustees could have instituted the necessary legal proceedings to enforce the bondholders' rights as a part of marshalling the assets of the debtor's estate—but failed to do so. Likewise the bondholders could have reorganized such claims, as part of the plan; but they did not. The plan did not alter or modify such claims and they were specifically preserved (R. 9, 111, 112).

Also, pursuant to the plan of reorganization and the order of the Court the debtor's trustees transferred and assigned all their rights in and to the collateral securing the eighteen series of bonds to the New Corporation (R. 3, 112).

Obviously therefore, whatever it may ultimately be decided was the devolution of the title or rights to the claims of the bondholders as against the corporate trustees under the original trust indentures—it is indisputable that such temporary title was divested from, and is NOT now in the debtor's trustees.

Respondents further misconceive the issues by disputing the analogy between the confirmation of a plan of reorganization and the confirmation of composition, and assert that the latter operates as a discharge whereas the former effects a discharge only upon final decree. Just what bearing the discharge of the debtor has upon the question of whether the debtor's trustees became strangers to the trust funds after the confirmation of the plans and the transfer of the estate out of the custody of the bankruptcy court to the substituted trustee pursuant to the plan so as to entitle the debtor's trustees to prosecute the bondholders' claims against the superseded corporate trustees, petitioners cannot conceive. The right to assert and prosecute such claims depends entirely on who holds the title thereto—and as pointed out above—the one uncontroverted fact in the case at bar is that such title is not in the debtor's trustees.

In all prior appeals, Central Hanover Bank & Trust Co. v. Bank of Manhattan, 105 F. 2d 130, Manufacturers' Trust Co. v. Kelby, 125 F. 2d 650, and Brooklyn Trust Co. v. Kelby, 134 F. 2d 105, the Circuit Court decided that the restoration actions by bondholders were part of the trust funds or res. Such trust funds, which prior to the confirmation of the plans were in the custody of the reorganization Court were by that Court's order transferred and assigned to the successor trustee and the title to such claims of the bondholders vested in the successor trustee.\*

No asset, tangible or intangible remained in the Court's control as a bankruptcy res and consequently no bankruptcy estate remained for administration. In re Paramount-Publix Corp., 82 F. 2d 230 is therefore inapposite.

In Reconstruction Finance Corp. v. Bankers Trust Company, decided February 8th, 1943 U.S., 87 L. Ed. 481, 63 S. Ct. 515, the services compensated were rendered and incurred "in connection with the proceedings and plan" and the Court held Sec. 77, Sub. c (12) applicable and it has no bearing in the instant case.

In Gross v. Bush Terminal Co., 105 F. 2d 930, the fees and allowances that were awarded were for services that

The right of the bondholders to object to the accounts was a derivative right which accrued to them as beneficiaries because the modified trust indenture absolved the substituted trustee from such duty.

were a "contribution to the plan" and the question of a right to or procedure for an appeal was not presented.

Gross v. Irving Trust Co., 289 U. S. 342, involved a question of the right of the State Court to fix fees of its receiver and counsel after the supervention of bankruptcy and the vesting of the title to bankrupt's property in the trustee in bankruptcy. The Court held the bankruptcy court had exclusive jurisdiction to fix the compensation and granted a summary turn over order.

In the Matter of B. H. Inness Brown, N. Y., not officially reported, Law Report News, April 27, 1943, the services were rendered in the State Court as a step to marshal assets of the bankruptcy estate. The decision was by a divided Court, 4 to 3, but seems in harmony with the contention that the services were in a bankruptcy proceeding, i.e., conducted in the State Court pursuant to the direction and authority of the bankruptcy court.

All these cases cited and relied on by respondents had one common factual prerequisite which was the very basis of the decisions. In each case there was a "bankruptcy estate" in the control of the Court, title to which was in the trustee in bankruptcy, which was being administered by the bankruptcy court, and out of which the fees and allowances awarded were to be paid. See Sherman v. Buckley, 119 F. 2d 280, cert. denied 314 U. S. 657. Per contra, in the case at bar, the accounting proceeding was not a bankruptcy administration—but the administration by a Court of Equity of a continuing voluntary inter vivos trust. The fund realized by the services rendered was not a fund, to which a bankruptcy trustee had title but one in which the title was held by a trustee under the terms of the trust indenture. The litigation in which the services were rendered was not between a "bankruptcy trustee" and adverse claimants, but between the superseded trustee of the voluntary express trust and the beneficiaries of the trust. It involved no rights or claims to any part of a bankruptcy estate—but the rights of the beneficiaries of the trust to a specific performance of the trust and the restoration to the trust funds of property and cash improperly diverted therefrom. The money and property recovered, were not paid to a "bankruptcy trustee," but into the trust funds securing the bonds and to the successor trustee under the trust indenture.

The Bankruptcy Act is replete with proof that Congress recognized the inherent difference between a bankruptcy proceeding and controversies arising in or out of bankruptcy. Section 23 confers on the District Courts jurisdiction "of all controversies at law or in equity, as distinguished from proceedings under this Act \* \* \* " Section 24 confers appellate jurisdiction on the Circuit Court "in proceedings in bankruptcy \* \* \* and in controversies arising in bankruptcy. \* \* \* " This Court has consistently recognized such distinction where the bankruptcy court and the State Court had concurrent jurisdiction of a controversy. Schoenthal v. Irving Trust Co., 287 U. S. 92; Taylor v. Voss, 271 U. S. 176; Collett v. Adams, 249 U. S. 545.

Section 241 of Chapter X et sequi only confer jurisdiction on the district judge to "allow reimbursement for proper costs and expenses \* \* \* incurred in a proceeding under this Chapter." Obviously therefore the limitation on the right to appeal from allowances of compensation contained in Section 250 was intended by Congress to apply only to such allowances as were fixed and made under the specific authority of Section 241—i.e., in a "proceeding under this Chapter" and can have no application to allowances for services rendered in a controversy between a superseded trustee of an express trust and the beneficiaries of the trust involving the enforcement of the rights of the beneficiaries of the trust, which rights by the plan of reorganization were retained by the bondholders—and revested in the bond-

holders upon the confirmation of the plan before the accounting petitions were filed.

#### II.

# As to the District Court's post-reorganization jurisdiction.

The question of the jurisdiction of the District Court over the accounting actions below is not an issue in this case. Respondents, however, have quoted copiously from the opinion of the Circuit Court in Brooklyn Trust Company v. Kelby, 134 F. 2d 105,\* to prove such jurisdictionwhich has never been attacked or disputed by any party to the instant proceeding. That case advanced and discussed various theories upon which the lower Court had the jurisdiction and the power to pass upon and settle the accounts of the superseded corporate trustees, but it had no occasion to, nor did it attempt to pass upon the issues now presented to this Court. In that case the question involved was whether the District Court, having taken jurisdiction over the corporate trustee's account as superseded trustee of the 5th Series bond issue of the debtor, had the power and properly exercised the power to enjoin an action in the State Court brought by Brooklyn Trust Company as a testamentary trustee, a former bondholder, against said superseded trustee, based upon alleged violations of its trust duties.

<sup>\*</sup> Brooklyn Trust Company, on May 6th, 1943, filed its petition for a writ of certiorari, and served same on the petitioners herein on May 7th, 1943; petitioners herein as respondents in the Brooklyn Trust Company case will file their brief in opposition to said writ on or before May 27th, 1943. The motive of respondents herein, in referring to the Brooklyn Trust Company case probably was to integrate that petition for a writ with the instant petitions for writs in the minds of this Court so that they may be considered and passed on at one and the same time.

The question of the basis of the Court's jurisdiction over the accounting proceedings is not important in this case. It is conceivable that an accounting by a trustee of an express trust may be laid in the Federal Court based on diversity of citizenship, or as in the case at bar, because the accounting was incidental to the power of the Court, pursuant to a confirmed plan of reorganization to supersede the trustee and substitute a new trustee, or because as suggested by the Circuit Court the superseded trustee consented to the jurisdiction of the District Court; or possibly it may be based on the inherent flexible power of a Court of Equity to administer justice to meet the particular situation presented. Regardless of what may be considered and determined to be the basis of the Court's jurisdiction what is of greatest moment is the extent of such jurisdiction and power in a determination of the law applicable to the rights of the parties litigant.

The Circuit Court on three occasions in connection with the accounting proceedings has ruled that such rights must be measured by the laws of New York State, Central Hanover Bank & Trust Co. v. Bank of Manhattan Co., 105 F. 2d 130; Manufacturers Trust Co. v. Kelby, 125 F. 2d 650, cert. denied 316 U. S. 697; Brooklyn Trust Co. v. Kelby, 134 F. 2d 105 (certiorari pending). These decisions were in conformity with the ruling of this Court in Erie v. Tompkins, 304 U. S. 64.

In the case at bar the District Court did not measure the rights of petitioners and respondents as if the accounting proceedings were litigated in the Court of New York State, and the Circuit Court has without opinion, improperly denied to petitioners the right of review which would have been available to them in the Courts of New York State.

After the confirmation of a plan of reorganization and final decree closing the estate the bankruptcy Court's jurisdiction terminates, except only as jurisdiction is necessary to protect the Court's decrees or it has been specifically retained by the provisions of the plan or the order confirming the plan. A general reservation of jurisdiction in the order of confirmation is ineffectual to extend or continue the bankruptcy jurisdiction of the Court. As was said in Re Flatbush Ave. Nevins St. Corp., 133 F. 2d 766 (C. C. A. 2):

"Congress did not intend that the Bankruptcy Court should after approval of a plan under Chapter X \* \* \* have power to remain a wet-nurse to the reorganized company. A bankruptcy court cannot obtain that power merely by inserting a provision reserving jurisdiction."

The jurisdiction of the District Court in the case at bar to take and judicially settle the accounts of the superseded trustees stemmed from the provisions of the plan of reorganization and the order confirming the same and not from any general jurisdiction under the Bankruptcy Statute. The exercise of such jurisdiction is complementary or auxiliary to the confirmation of the plan.

In Clinton Trust Co. v. John H. Elliott Leather Co., 132 F. 2d 299 (C. C. A. 2), in respect to the question of post reorganization jurisdiction the Court said:

"Quite consistently with this view, and as explained by several text writers, the reorganization court, as in the old equity receivership, may well be permitted to retain jurisdiction to protect its decree, prevent interference with the execution of the plan, and otherwise aid in its operation. \* \* \* But this is a jurisdiction at most 'complementary' to that of confirming the plan and in reality only auxiliary to it. \* \* \* It is not one for control of the corporation indefinitely or for keeping it in tutelage to the court, so that the latter must pass upon its business activities. \* \* \* "

Under the circumstance then, in the instant case, the substantive rights of the parties must be construed by the Court as such rights were fixed by the provision of the plan—in accordance with state laws—precisely as if the Court were construing a contract or agreement, and as the plan preserved the rights of the bondholders as against the superseded trustees, in the enforcement of such rights the bondholders can be placed in no better or worse position than they would be in if such rights were being enforced in the State Court.

True, in the case at bar, there has been no final order closing the estate; nor has any order been entered discharging the debtor. However, an order discharging the debtor, it having been adjudged insolvent, and a new corporation of the same name having replaced it, would be but a meaningless gesture and can concern no one. The plan was consummated by the creation of the new corporation, the transfer of the trust funds to the successor trustees, the execution of the modified trust indenture and the transfer of all the property and rights of the debtor (which were temporarily vested in the debtor's trustees) to the new corporation. The new corporation and the successor trustee have been functioning under the plan for over five years, and as the rights of the bondholders against the superseded trustees were not affected by the plan, in the ascertainment and determination of such rights the final order closing the estate in bankruptcy can have no pertinence. Dated, May 19th, 1943.

Respectfully submitted,

SAMUEL SILBIGER, Counsel for Petitioners.